No. 230

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE NINTH CIRCUIT.

ALBION LUMBER COMPANY,
(a Corporation),

Plaintiff in Error,

vs.

MARIA de NOBRA, Administratrix of the Estate of Jose de Nobra, Deceased,

Defendant in Error.

Points, Authorities, and Brief for Defendant in Error.

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Attorney for Plaintiff in Error.

WARREN OLNEY, Esq.,
Of Counsel.

United States Circuit Court of Appeals, for the Ninth Circuit.

ALBION LUMBER COMPANY (a Corporation),
Plaintiff in Error,
vs.
MARIA DE NOBRA, Administratrix of the Estate of Jose de Nobra, Deceased,
Defendant in Error.

Brief, Points and Authorities of Defendant in Error.

Statement of the Case.

Counsel for the plaintiff in error, in his statement of the case, seems to be a little clouded in his mind as to the exact position his client occupies in this case in this court, especially in his opening paragraph. To settle all doubt, we will state the exact position of the parties. It is this: The plaintiff in error in this court was the defendant in the Circuit Court. The defendant in error in this court was the plaintiff in the Circuit Court.

The plaintiff in error carried its own freight and employees, and all persons who desired to ride, over its logging railroad, and also freight for other persons, " consisting of hay, grain and supplies for the camp " going up, and ties coming down. Those were hauled " for Mr. Myers. It was a common practice for every " one to ride up and down the road. I never heard of

" any objections by the defendant. I rode up and " down the road perhaps a dozen times; no fare was " ever demanded from me, or anybody else, so far as I " know. Never heard of such a thing." (Testimony of Mr. Briggs, pages 28, 29, Transcript of Record.)

The superintendent of the railroad did not deny that he told the deceased to get on the train and go and get their blankets. Testimony of John Vieria (pages 25–26) and testimony of Henry B. Hickey, the superintendent of the logging railroad, (pages 27–28) transcript of record. There was no proof that "the " position on top of a carload of logs is a dangerous " one." On the contrary, the conductor of the train at the time of the accident, was riding on the top of the logs. He testified: " I consider riding on that " logging train and sitting upon the logs as safe " a place to ride as down on the platform down by the " side of the logs." He was riding at the time of the accident on the top of the logs himself, (page 55 transcript of record).

The conductor saw the deceased on the top of the logs before the train had started. He testified: " Be- " fore the train had left the upper tank I saw the Por- " tuguese on the fourth car with Mr. Pettit and another " fellow. When the train started I know they were " all on that car. I did not object to the Portuguese " or anybody riding."

Transcript of Record, p. 55.

At the time of the accident the train was being run at a reckless and dangerous rate of speed. Testimony of Briggs, pages 33, 34, Transcript of Record, Cortez,

the conductor, testified as follows: "The locomotive "and about two cars and a half passed the bull; he "stood right in next to the bank, and the locomotive "and three cars—two cars and a half passed him, and "I suppose he went to turn around. The bull was "standing at the side of the track. My idea is that "the bull pushed the logging train off the track and "down the bank." (Page 57, Transcript of Record.)

Six and a half cars loaded with logs were thrown from the track and down the bank and wrecked. The locomotive did not run over the bull. The engineer testified: "The first thing I knew of the accident, I "felt a jar; the engine didn't strike anything. Six "and a half cars were wrecked. They were loaded "with logs. * * * There were three cars and a "half car attached to the engine that had no brakes "on." (Pages 59, 63, Transcript of Record.)

At the time of the accident three young ladies were riding on the engine with the engineer and fireman. Two of the young ladies were sitting on the fireman's seat and one was sitting on the engineer's seat.

Page 23, Transcript of Record. Two of the young ladies were sworn as witnesses for the defendant at the trial, but neither of them remembered what was going on from the time the train left the upper tank until the time of the accident. (Pages 51, 52, 53, Transcript of Record.)

Three persons were killed in the wreck—two Portuguese and the brakeman, Pettit.

Miles Standish testified that he was the General Manager of the Albion Company; (page 38) that "there was no way of getting up and down those seven

" miles except by riding on the train or walking. " There was no wagon road ; (page 40) * * * " that " those who rode on the train had to ride on the log- " ging cars, there was no other place provided for " them to ride (pages 40, 41) * * * ; that " there " was no other place for the brakeman and conductor " or anybody else to ride except on the logging cars ; " that no one except Mr. Hickey had anything to do " with the logging railroad. Mr. Hickey employed " the men that were employed in the redwoods." (Pages 40, 41, Transcript of Record.)

Mr. Standish testified that he did not know of a single instance where the company had objected to persons riding on the train if they wanted to do so. The defendant in its answer alleged that the road was about eight miles long (page 16); the General Superintendent testified that he supposed there were eleven miles including branches (page 40). The engineer testified: That " on this trip they were running at " the usual rate of speed" (page 61); that "our time " from the upper switch was from 30 to 40 minutes." (Page 62, Transcript of Record.)

There is no proof in the record that any other case depends on this one. We object to any statement by counsel in his brief of any fact not in the record in this case. Whether one or more other cases are now pending against the plaintiff in error by reason of said accident cannot affect this case and should not in any manner be dragged into this case.

We deny that the three questions (or either of them) set out by the counsel for the plaintiff in error on page 4 of his brief, are involved in this appeal, "for the

reason that we contend that there is no record here under the universal practice in the Federal Courts, which this Court can look into. No bill of exceptions is here. The only record now before this Court is the statement on motion for a new trial settled and allowed by the Circuit Judge. As counsel says in his brief (page 4) it is in accordance "with the California practice" and upon which the motion for a new trial was denied.

We have stated the case thus fully, because, as we understand the rules of this Court, that unless we controvert the statement of the case, as made by the plaintiff in error in his brief, we are supposed to admit the facts as therein set forth. Not waiving any of our rights as above stated, but insisting upon them, we will further proceed to consider the brief of the counsel for the plaintiff in error:

Point One.

The action of the Circuit Court in denying the motion for a new trial, being a matter of discretion, cannot be examined in this court. Such has been the practice of the Federal Courts from the time of their existence. For this Court to hold otherwise, and now look into and examine the statement on motion for a new trial, to see if the Circuit Judge, in denying the motion, committed error, would be to overturn the Federal practice for more than one hundred years. We apprehend that this Court will not assume any such responsibility. And we do not think it will require any argument to convince this Court of that

fact. In support of this position we cite the following authorities:

Pomeroy's Lessee *vs.* Bank of Indiana, 1st Wall, 597.

Henderson *vs.* Mann, 5 Cran., 11.

Mar. Ins. Co. *vs.* Young, 5 Cran., 187.

McLanahan *vs.* The Universal Ins. Co., 1 Pet., 183.

U. S. *vs.* Buford, 3d Pet., 32.

Barr *vs.* Gratz, 4 Wheat., 213.

Blunt *vs.* Smith, 7 Wheat., 248.

Brown *vs.* Clark, 4 How., 4.

Connor *vs.* Peugh's Lessee, 18 How., 395.

Sparrow *vs.* Strong, 4th Wall., 598.

Suydam *vs.* Williamson, et al., 20 How., 433–440.

Leiter *vs.* Green, 2 Wheaton, 306.

Morsell *vs.* Hall, 13 How., 215.

Kerr *vs.* Clampkett, 95 U. S., 188.

Potomac R. R. Co. *vs.* Trustees, etc., 91 U. S., 130.

Taylor *vs.* Morton, 2d Black., U. S., 484.

The Eutaw, 12th Wall. (1870), 141.

Point Two.

The Circuit Judge committed no error as against the plaintiff in error in his instructions to the jury. The instructions were more favorable to the defendant on the trial of the action than it was entitled to have given. The corporation had undertaken to carry the deceased by the powerful and dangerous agency of steam, and it owed to him the highest degree of care.

This doctrine has been held in a great number of cases, both State and Federal. It is now the settled law of the Federal Courts. It matters not whether the party injured was being carried gratuitously or otherwise.

Philadelphia etc., R. R. Co., *vs* Derby, 14 How., 486.

In this case the plaintiff was traveling gratuitously on a passenger train. The Court said; "whenever " carriers undertake to carry passengers by the power- " ful, but, dangerous agency of steam, public policy " and safety required that they should be held to the " greatest possible degree of care and diligence. And " whether the consideration for such transportation " be pecuniary or otherwise, the personal safety of the " passenger should not be left to the sport of chance or " the negligence of careless agents. Any negligence " in such cases may well deserve the epithet of " gross."

This statement was approved in the case Steamboat New World *vs.* King (16 How., 474). The Court said: " We desire to reaffirm the doctrine not only as resting on public policy but on sound principles of law."

In this case the passenger was being carried gratuitously on the steamer.

In the case of the N. Y. Central R. R. Co. *vs.* Lock, reported in the (17th Wall, 357) a party was accompanying his cattle on a freight train and was injured. The Court said : " The highest degree of carefulness " and diligence is expressly exacted." The Court in this case argued the question very fully. We expressly call the attention of the Court to this case.

In the case of Indianapolis R. R. Co. *vs.* Horst, reported in 93, U. S. 3d Otto. The Court held:

"That the rule of law that the standard of duty on "the part of the carrier of passengers should be ac- "cording to the consequences that may ensue from "carelessness, applies as well to freight trains as to "passenger trains. It is founded deep in public "policy and approved by experience and is sanctioned "by the plainest principles of reason and justice."

The above doctrine is fully sustained in the case of Treadwell *vs.* Whittier, 80 Cal., and a great number of cases there cited. We especially call the attention of the Court to that case and cases cited on pages 588, 589.

The Circuit Judge charged the jury in effect that the corporation was only required to exercise slight care and diligence to prevent injuring the deceased, and that unless the plaintiff could prove gross negligence, she could not recover.

Point Three.

If the deceased was a trespasser, the corporation, after it became aware of the fact that he was aboard the train, owed to him ordinary care and diligence to prevent doing him injury. There is no dispute but that the defendant had this knowledge. The conductor testified that he saw the deceased on the car with the brakeman before the train left the upper tank, and that he did not tell him to get off the train; that he was in plain sight of him. Lower quarter of page 55, Transcript of Record.

This doctrine is supported by numerous authorities:

Marble *vs.* Ross, 124 Mass., 44.

Brown *vs.* Lynn, 31 Pa. St., 510.

Kelly *vs.* U. R. T. R. R. Co., 75 Mo., 284.

Guenther *vs.* R. R. Co., 75 Mo., 299.

Hansen *vs.* R. R. Co., Cal. Pacific Reporter, Vol. 38, N. 14, (1895,) page 957.

Carraher *vs.* San Francisco Bridge Co., 100 Cal., 177.

In the case of Hansen *vs.* R. R. Co., the Court distinctly held that if a person was a trespasser on the track of a railroad, that the company owed him ordinary care and diligence to avoid injuring him when they discovered him on the track. This is stated in the last part of the opinion.

Point Four.

On page 11 of the brief of counsel, the statement is made that "on the trial it was not disputed, but that "the facts as set out in the answer were correct. No "attempt was made to sustain the allegations of the "complaint in that regard."

We are surprised at the temerity of counsel in putting such a statement in his brief, which the record shows to be absolutely incorrect. It was proven on the trial and not denied by the defendant that freight was hauled for parties other than the Albion Company over its railroad. "It consisted of hay, grain and "supplies for the camp going up and ties coming "down. Those were hauled for Mr. Meyers. It was "the common practice for everybody to ride up and "down the road. I never heard of any objections

" being made by the defendant. I have rode up and " down, perhaps a dozen times; no fare was de- " manded of me or any body else so far as I know. " Never heard of such a thing." (Transcript of Record, pages 28, 29.)

We are equally surprised at the statement of counsel on said page 11 of his brief in regard to denying the allegation of the complaint that the road was not fenced. The complaint alleged in paragraph IV, page 4, Transcript of Record, that the road was not fenced as required by law. The defendant in its answer, page 12, Transcript of Record, denies that it failed to fence its road as required by law, and denies that it was required by law to fence its road. There the denial ends. In addition to said allegations, aforesaid, the complaint in said paragraph 4, page 4, contained this allegation:

" That throughout the entire length of said railroad " there was during all of said time, no fence what- " ever erected or maintained on either or both sides of " said track to separate railroad from adjoining land " country."

This allegation the defendant did not and dare not answer or deny. Therefore, the fact stands admitted that said railroad was not fenced at all. Hence no proof was required or offered at the trial and none was needed to prove an admitted fact. Nowhere in the complaint is it alleged that the corporation was a common carrier of freight or passengers, but it is alleged that the defendant used its road for the purpose of " carrying passengers and moving freight on " and over said railroad."

Both of these allegations, as we have shown, were fully sustained at the trial. In fact the general manager testified that there was no way to get up to the lumber camps—some 8 or 11 miles—except to be carried on the logging train, or to walk, as there was no wagon road.

We submit to this Court that the issues numbered 1st, 2d, 3d, 4th, 5th and 6th, on pages 14–15 of counsel's brief, were all submitted to the jury and answered in the affirmative. As to 2d and 3d, the defendant admitted that its road was not fenced at all.

On page 17 of this brief counsel says that there was no proof, that its train was run at a dangerous and reckless rate of speed, because no one swore that a rate of 30 miles an hour on a logging road was a dangerous rate of speed. It seems that the fireman swore as he "supposed that 30 or 40 miles an hour would be " dangerously fast on that road."

If running a logging train of 13 cars—two trucks to each car—the entire train loaded with heavy saw logs, on a steep down grade, at such a rate of speed as to wreck six and one-half cars, break the coupling of the cars so as to allow two and one-half cars to be detached from its train—derail six cars—throw some of them down the bank, and the conductor swore they were thrown down the bank, (page 57 Transcript of Record), kill two men dead, and injure one so that he died from the injuries in two days, is not sufficient evidence of a dangerous and reckless rate of speed, then all the expert evidence in christendom could not prove it. The jury did not evidently believe the witnesses for the defendant. The slim and silly pretense

of the defence that a bull either in turning around struck his forward or latter end against the moving train, or that he lowered his head and butted his horns against a heavily loaded train of logs and derailed six and one-half cars—sent some of them down the bank—and broke numerous couplings, is too supremely ridiculous and silly for a "trained judicial mind" to contemplate, and it is evident the jury so thought.

Point Five.

Was the deceased a passenger on the train at the time of the accident? We hold that he was. In the case of Sherman *vs.* The Hannibal & St. Joseph R. R. Co. (reported in the 72 Mo., page 65), the Supreme Court of Missouri held that "It may be conceded that " the plaintiff is to be regarded as a passenger at the " time he was injured, the train being one on which " persons were allowed to be carried, though the plain- " tiff boarded the train without the permission or " knowledge of the conductor, yet the conductor, after " he became aware of his presence on the train, suf- " fered him to remain, he was entitled to the same " protection as if he had paid his fare." Citing Whitton *vs.* Middlesex R. R. Co. 107, Mass. 108.

Point Six.

We have examined all of the numerous authorities cited in the able and learned brief of counsel, and we have failed to find a single case which holds that even though the deceased is to be regarded as a trespasser, that after the corporation became aware of his presence on the car did it not owe to him ordinary diligence to avoid injuring him.

Point Seven.

Mr. Hickey was the Superintendent of the Albion Company's wood and logging railroad. He had the entire charge. Page 27, testimony of Hickey. "No "one except Mr. Hickey had anything to do with the "logging railroad. Mr. Hickey employed the men "that were employed in the redwoods." Page 41, testimony of Standish the General Manager of the company, Transcript of Record. Then so far as the entire management of the business of the corporation was concerned in that department, Mr. Hickey stood in the place of the corporation. It was in the line of his employment to run the trains, employ and discharge men, and to permit or not to permit persons to ride upon the trains, as he saw fit. He was not only the ostensible, but the actual manager of the whole business. If at the time he employed the Portuguese to work in the redwoods and told the deceased and two others to go down on the cars and get their blankets and return next day and he would give them employment, the relation of master and servant existed between him and the corporation, the deceased at the time he met his death was rightfully on the train, and it made no difference whether the corporation did not authorize or even know of Hickey's act. Philadelphia and Reeding R. R. Co. *vs.* Derbey, (14 How., 486), the whole doctrine is here fully discussed, and we earnestly call the Courts attention to this case as decisive of the question.

Point Eight.

We now call the attention of the Court so far as the law is concerned, to ~~its~~ the case of Sweeney *vs.* R. R. Co.,

10 Allen, Mass., cited in counsel's brief. In that case the Court says: "The true distinction is this: a mere "passive acquiescence by an owner, or occupier in a "certain use of his land by others involves no liability; "but if he directly, or by implication induces persons "to enter upon, and pass over his premises, he thereby "assumes an obligation that they are in a safe condi- "tion, suitable for such use, and for a breach of this "obligation he is liable in damages to a person in- "jured thereby."

Did the corporation directly or by implication induce the deceased to ride upon its logging railroad? The corporation wanted men to work (pages 25, 27, 28, 29, transcript of record). The deceased, with others, went to the camp to obtain work. The only means furnished to go and return was the logging train. There was no wagon road for the eight miles. Every one rode up and down on the train. No objection was made to their riding. The deceased got on the train, and the conductor saw him on the logs before the train started. He sat by the side of the brakeman. The conductor testified it was a safe place to ride. As a matter of law, will any Court say that no inducement by implication or otherwise was held out to the deceased to ride on the train? We think that no Court will so state or hold.

Point Nine.

There can be no such thing as contributory negligence in this case. The deceased was riding where the conductor testified, was as safe a place as it would have been down on the platform. No other place to

ride had been provided for any one to ride, so Mr. Standish testified. The conductor and brakeman rode there. But on this point the Court submitted the question to the jury and directed it to find for the defendant if it found that the deceased was guilty of negligence in getting on the logs, unless it should find that the defendant might have by the exercise of reasonable care and prudence avoided the consequence of such negligence. This instruction presented the law as favorably for the defendant as it could ask.

Point Ten.

The instructions asked by the defendant were palpably erroneous. We do not care to discuss them. As the Court will see by an examination of them, that it will so appear. The instructions continuously ignored the fact that the corporation owed the deceased any duty whatever.

Argument.

The fact that the corporation was operating its logging railroad on its own land can cut no figure in this case. It carried over its road on its logging train all persons who desired to ride; also hay, grain, produce and redwood ties for other parties, and it operated its road by means of locomotives and cars. In other words, it carried its passengers and moved its freight by the powerful and dangerous agency of steam.

The case of Treadwell vs. Whittier, in the 80 Cal., 589, determines that matter. In that case the defendants owned the building and grounds, and for its own use owned and operated an elevator in its store, on which its customers were allowed to ride up and down